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Author v. Parodist: Striking a Compromise

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I. THE PARODY CONFLICT

The treatment of parody¹ remains one of the most troublesome areas in copyright law today. The work of a parodist necessarily depends upon the use of a preexisting work of authorship for its creation. This dependence brings parody into conflict with the original author's² exclusive right under United States copyright law³ to control certain uses of his work. The parodist takes material⁴ from the work of authorship being parodied in order to identify that work as the object of his or her own creative essay, yet the parody adds new matter to the underlying work through the individual effort of the parodist. This combination of a preexisting work with new matter results in the creation of a derivative work, which the original author has, in principle, the exclusive right to prepare under the 1976 Act.⁵ Without the permission of the original author to use the original work, a parodist thus may infringe upon the copyright in the underlying work⁶ and incur liability under the 1976 Act for actual or statutory damages.⁷ A parodist could even incur criminal liability and risk forfeiture of his or her parody,⁸ depending on the court's perception of the parodist's intent to infringe. The 1976 Act also permits a court to enjoin a parodist from creating or disseminating his or her parody.⁹ Finally, for any unlawful use found of a preexisting work, the 1976 Act denies a parodist copyright protection of the parody as a derivative work.¹⁰

Despite the legal conclusions that seem to flow from this statutory framework, the courts have been reluctant to treat parody as copyright infringement. They tend to

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1. The term "parody" is used broadly in this Article to encompass any form of critical or humorous expression which depends on a preexisting work of authorship for its creation and contains independent effort. A work that might be called a burlesque, travesty, or pastiche under another definition, for example, is treated as a parody for purposes of this Article.

2. The terms "original author" and "author" are used interchangeably in this Article to refer to the creator of the original work of authorship that is being parodied. The original author is presumed to be the copyright owner of the original work, unless otherwise noted.

3. 17 U.S.C. §§ 101-810 (1976) [hereinafter referred to as the 1976 Act].

4. Historically, the parodist takes the substance, or essence, of the original work in order to create a parody. The quantity of the original work taken does not determine whether a parody has been created, as long as the image of the original work is brought to the audience's mind. See *infra* notes 56-58 and accompanying text.

5. 17 U.S.C. § 106(2) (1976).

6. *Id.* § 501.

7. *Id.* § 504.

8. *Id.* §§ 506, 509. These penalties are not likely to be imposed upon a parodist, however.

9. *Id.* § 502.

10. *Id.* § 103(a).

ignore the issue of consent to parody altogether and attempt to mitigate the legal disabilities of parodists by treating parody cases under the fair use doctrine.¹¹ The fair use concept developed under the common law¹² and first was codified in section 107 of the 1976 Act, which states four factors to be considered when determining if a particular use is a fair use.¹³ While the intent of the drafters was that a codified doctrine of fair use would continue to be interpreted flexibly in order to meet the varying circumstances that arise,¹⁴ its application to the parody cases has not yielded satisfactory results.

The courts deciding a number of the well-known parody cases¹⁵ have determined fair use by utilizing the third factor to be considered, "the amount and substantiality" of the portion of the original work taken,¹⁶ as a determinative test.¹⁷ The courts accept the idea that a parodist's substantial or nearly verbatim copying of

11. The fair use concept was summarized in *Loew's, Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165, 174 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam sub nom. Columbia Broadcasting Sys., Inc. v. Loew's, Inc.*, 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958) as follows:

Fair use may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a *reasonable manner* without his consent, notwithstanding the monopoly granted to the owner by the copyright. Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is *reasonable and customary*.

Id. (citing H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)) (emphasis added by court). See generally M. NIMMER, 3 NIMMER ON COPYRIGHT § 13.05[C] (1984) [hereinafter cited as NIMMER ON COPYRIGHT].

12. The two cases generally recognized as first defining the doctrine of fair use are *Folsom v. Marsh*, 9 F. Cas. 342, 347-48 (C.C.D. Mass. 1841) (No. 4901) and *Lawrence v. Dana*, 15 F. Cas. 26, 59-61 (C.C.D. Mass. 1869) (No. 8136).

13. Section 107 reads in full as follows:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1976).

14. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680. The drafters intended § 107 to be no more than a codification of the existing judicial law of fair use. *Id.*

15. The early cases dealing with parody include *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914); *Green v. Luby*, 177 F. 287 (C.C.S.D.N.Y. 1909); *Green v. Minzensheimer*, 177 F. 286 (C.C.S.D.N.Y. 1909); and *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903). Later cases of particular interest are *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam sub nom. Columbia Broadcasting Sys., Inc. v. Loew's, Inc.*, 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958); *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124 (N.D. Ga. 1981); *Warner Bros. Inc. v. American Broadcasting Co., Inc.*, 523 F. Supp. 611 (S.D.N.Y.), *aff'd*, 654 F.2d 204 (2d Cir. 1981); *Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975); and *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

16. 17 U.S.C. § 107(3) (1976).

17. See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981); *Warner Bros., Inc. v. American Broadcasting Co.*, 654 F.2d 204, 209 (2d Cir. 1981); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756-57 (9th Cir. 1978); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd* 623 F.2d 252 (2d Cir. 1980); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 359 (N.D. Ga. 1979); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975).

an original work is a taking that exceeds the permissible scope of fair use,¹⁸ but that a taking of only as much as is necessary to "conjure up" the original work is allowed.¹⁹ However, no clear criteria are set out for determining exactly how much is necessary to conjure up the original. Nor is the legal result clear in the case in which a parodist takes more than is necessary to conjure up the original, but not enough to constitute substantial copying under the doctrine of *Benny v. Loew's, Inc.*²⁰

Certain cases have injected an additional fair use factor into the analysis by focusing upon a parody's effect on the market for the original work.²¹ These cases hold that when the parody does not serve as a substitute in the market for the original work, fair use can be found if the copying is not substantial.²² This overemphasis on economic harm is misplaced in copyright law, and provides no magic solution to the specific problems raised by parody.²³ This approach also begs the question of how much a parody can take and still be regarded a fair use.

The fair use factors, as thus applied, have generated confusion in the law of parody.²⁴ This confusion, in turn, induces the courts to consider factors that are not appropriately part of the fair use doctrine in making decisions.²⁵ The outcome of any given case often appears to have turned on an individual court's perception of the particular parody's value to society, weighed against the harm caused by denying the original author the right to exclusive control of such a use of the underlying work. The case law thus has developed in a reactionary fashion, with the decisions swinging back and forth to favor first the author, then the parodist.²⁶

18. This principle is derived from the Ninth Circuit's holding in *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam sub nom.* Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958).

19. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955) first introduced the "conjure up" test, which then was expressly adopted by the Second Circuit in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 542-43 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

20. 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam sub nom.* Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958).

21. 17 U.S.C. § 107(4) (1976); *see infra* note 22.

22. *See* MCA, Inc. v. Wilson, 677 F.2d 180, 184 (2d Cir. 1981); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Warner Bros., Inc. v. American Broadcasting Co., Inc.*, 523 F. Supp. 611, 617 (S.D.N.Y.), *aff'd*, 654 F.2d 204 (2d Cir. 1981); *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 356 (N.D. Ga. 1979).

23. *See infra* note 34 and accompanying text. *See generally infra* notes 30-37 and accompanying text.

24. *See infra* note 26, which traces the zig-zag pattern of the recent parody cases.

25. *See* for example, *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981), in which the court considers the obscenity of the work in question; *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 759 (9th Cir. 1978), in which the court discusses a parodist's First Amendment right to parody; *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979), in which the court holds that a parody must serve a critical, as opposed to a merely humorous, function in order to be protected; and *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980), in which the court discusses the controversy over whether parody can be protected even if it uses an original work to parody an aspect of life in general or only if it parodies the original work itself.

26. After *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam sub nom.* Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958), in which the court declined to apply the fair use analysis to parody, *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955) favored the parodist by holding that a parody was entitled to fair use treatment if it took only enough to conjure up the original work. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964), adopted the "conjure up" test in holding for the parodist. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), then found for the original author by holding that the parodist had copied substantially from the original work. *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 361 (N.D. Ga. 1979), also held for the original author by finding that the defendant's work was not a parody, while *Elsmere Music, Inc. v. National*

This case-by-case treatment of parody tends to obscure the traditional copyright principle that any work of authorship is worthy of protection if it contains copyrightable subject matter and is the product of independent creation.²⁷ Moreover, under the fair use analysis as currently applied, a court must favor the interests of one party over the other with little room for compromise. Over time, this approach may result in a subtle chilling effect on the creation of parody, especially parody of a more ambitious character. While parodists can conclude that the nature of their works may entitle them to invoke the fair use defense, parodists also know that this defense can prevent them from taking too much from the original work, and they have no clear indication of how much is too much for purposes of fair use. Furthermore, parodists cannot predict with certainty the kinds of parodies that are reasonably assured of protection. Hence, if there is a social interest in parody, as leading courts keep reiterating, this interest hardly is furthered when the parodists lack guidelines under current law to reassure them that they will derive economic benefit from their works instead of incurring liability for copyright infringement.

II. RECENT ATTEMPTS AT RESOLVING THE CONFLICT

The unsatisfactory state of the case law on parody has elicited considerable legal commentary.²⁸ Three recent commentators have proposed solutions to the parody conflict that are of particular interest.²⁹ All three agree in searching for some exclusive factor upon which a decision to protect parody should be made. Since each presents a different factor that is to be given paramount effect, however, the sense of confusion surrounding this area of the law is only intensified by their varied approaches.

Broadcasting Co., 482 F. Supp. 741, 747 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980), found that the parodist's work was a fair use. *Warner Bros., Inc. v. American Broadcasting Co.*, 654 F.2d 204, 211 (2d Cir. 1981), held for the parodist by finding no actionable infringement, but *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), did not allow the defense of parody under the circumstances of the case and thus held for the original author.

27. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951).

28. See, e.g., Bernstein, *Parody and Fair Use in Copyright Law*, 32 COPYRIGHT LAW SYMP. (ASCAP) 1 (1984); Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine By First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Hadl, *Parody Lyrics—The "Mad" Magazine Case*, 11 BULL. COPYRIGHT SOC'Y. 319 (1964); Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979); Mummery, *Parody and Plagiarism*, 116 NEW L.J. 1651 (Dec. 15, 1966); Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 SO. CAL. L. REV. 225 (1962); Nimmer, *The Law of Parody—Infringement*, 3 VAL. U.L. REV. 34 (1968); Rossett, *Burlesque as Copyright Infringement*, 9 COPYRIGHT LAW SYMP. (ASCAP) 1 (1958); Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 BULL. COPYRIGHT SOC'Y. 53 (1958); Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130 (1955); Comment, *A Copyright Quandary: Parody, Burlesque, and the Fair Use Doctrine*, 29 ALB. L. REV. 312 (1965); Comment, *Legal Perils of Parody and Burlesque*, 17 CLEV.-MAR. L. REV. 242 (1968); Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585 (1956); Comment, *Parody and the Law of Copyright*, 29 FORDHAM L. REV. 570 (1961); Comment, *Substantial Borrowing v. Fair Use, or, Spoof with Caution*, 30 MISS. L.J. 175 (1959); Note, *Burlesque of Literary Property as Infringement of Copyright*, 31 NOTRE DAME LAW. 46 (1955); Comment, *Copyright: Burlesque and the Doctrine of Fair Use*, 12 OKLA. L. REV. 276 (1959); Comment, *Piracy or Parody: Never The Twain*, 38 U. COLO. L. REV. 550 (1966); Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F.L. REV. 564 (1976); Note, *Parody and Burlesque—Fair Use or Copyright Infringement?*, 12 VAND. L. REV. 459 (1959); Comment, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163 (1981) [hereinafter cited as Comment, *Parody and Fair Use*]; Comment, *Parody of Copyrighted Works: Death of an Art Form?*, 4 WAYNE L. REV. 49 (1957); 56 MICH. L. REV. 1355 (1958); 23 MO. L. REV. 80 (1958); 31 N.Y.U. L. REV. 606 (1956); 28 ROCKY MTN. L. REV. 134 (1955); 10 SW. L.J. 68 (1956).

29. See Goetsch, *supra* note 28, at 57-65; Light, *supra* note 28, at 632-36; Comment, *Parody and Fair Use*, *supra* note 28, at 188-91.

Light, for example, focuses on the economic rationale behind the copyright monopoly.³⁰ He argues that a parody does not harm a protected interest of the original author unless that author loses some economic benefit or suffers some disincentive to create because of the parodist's use of the original author's work.³¹ Light contends that an original author rarely, if ever, gains incentive to create from the possible conveyance of the right to parody, and maintains that a parody does not compete with the original work in any market in which the original author would expect to license the use of his or her work.³² Light argues that unless the parody functions as a replacement or substitute that satisfies the same market demand as that for the original work, any harm to the original author should not be actionable under copyright law.³³

This approach, which stresses the economic harm argument censured by former Register Ladd,³⁴ fails to consider the possibility that a parody may provide economic benefit to the author of the original work. Financial gain through the granting of a license to parody arguably has not been one of the economic benefits upon which an author has counted in the past when creating his or her work. However, the fair use doctrine as applied thus far discourages an author from expecting economic rewards from parody by implying that parody will often be a fair use.³⁵ Furthermore, the economic rationale of copyright does not require that an author specifically predict all financially rewarding uses of the work at the time that he or she creates it. For example, if an author writes a successful novel, he or she can sell the movie rights to it, which in turn may open collateral markets in everything from dolls to T-shirts. However, the author has little expectation of benefitting from the sale of the right to prepare such derivative works until the novel becomes a success. Copyright nevertheless protects the author's exclusive right to license or prepare any and all derivative works, if and when economically feasible to do so. The treatment of parody, as a derivative work, should begin from the same principle.

30. Congress enacted the 1976 Act, and earlier copyright acts, under its constitutional power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8. Light summarizes the economic rationale given to justify this monopoly as follows:

The economic justification for copyright rests on the assumption that, unless given valuable rights in his creations, the author would not invest his labor in artistic works. This justification focuses on the societal interest in promoting artistic creations; it is a pragmatic judgment that, without sufficient protection, authors would cease to create and society would be deprived of their contributions.

Light, *supra* note 28, at 620.

31. Light, *supra* note 28, at 627; cf. Bernstein, *supra* note 28, at 39-44. Bernstein applies an economic disincentive analysis to the problem of parody and fair use and proposes the following rule as determinative: "Any secondary work that, in the long run, enhances the total production of art is a fair use." *Id.* at 44.

32. Light, *supra* note 28, at 633-35.

33. *Id.* at 634-35. Light contends that the copyright owners discussed in his article sought to protect their personal interests or "moral rights," and not the commercial or economic interest in their works, by bringing suit against parodists. *Id.* at 633. However, U.S. copyright law does not directly protect the moral rights of an author. *Id.* at 619-20, citing authorities. See *infra* note 37.

34. See Remarks of David Ladd, 24 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 593, at 21-22.

35. See *supra* notes 15-23 and accompanying text.

36. See most recently, the dissenting opinion in *MCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) ("permissible parody, whether or not in good taste, is the price an artist pays for success. . . ."), and the attitude of the Second Circuit in *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980), quoted *infra* at note 51.

A focus upon the market effect of parody is misplaced because a parody does not have to serve as a market substitute for the original work before it will deprive the original author of potential economic reward. If an author has little expectation of financial benefit from parody today, it is largely because the legal system seems increasingly inclined to give all of the reward to the parodist under the fair use rationale.³⁶ If the copyright system were to force a parodist at least to seek a license to parody and if the original author knew that he or she might benefit financially from such a license, there arguably would be some economic incentive to grant licenses to prospective parodists that would weigh in the balance against any concern on the author's part about violation of his or her "moral rights."³⁷

Goetsch has proposed another solution, which subdivides parody into two categories: legal parody and non-legal parody.³⁸ Legal parody is defined as "any work which imitates in a satiric manner the ideas and expression of an identifiable previously published work."³⁹ This privileged category is to be taken out of copyright altogether and accorded absolute protection under the First Amendment.⁴⁰ In contrast, non-legal parody, viewed as a mere copy, impersonation, or general humorous commentary, is to be treated under the standard copyright infringement analysis.⁴¹ Goetsch further argues for a rebuttable presumption that all parodies are legal and thus protected as free speech.⁴²

One problem with providing First Amendment protection to parodists in this manner is that a property right to which the author is entitled under section 106 of the 1976 Act is confiscated without compensation and without proof that this potentially far-reaching derogation from general principles of copyright law is necessary or justified. This approach obliges the author to establish his or her exclusive right to the preparation of a derivative work in the form of a parody, rather than forcing the parodist to justify an unauthorized use of the original work on public interest grounds. The public does have an interest in parody, but this interest does not entitle the parodist to broadly override the author's rights in his or her work that are expressly given by Congress.

Goetsch attempts to justify applying the First Amendment to parody by arguing

37. The "moral rights" of an author are generally defined to include the following rights:

[T]o be known as the author of his work; to prevent others from being named as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing.

2 NIMMER ON COPYRIGHT, *supra* note 11, § 8.21[A]. United States copyright law does not expressly protect these rights, although it indirectly does so by giving the author the exclusive right to control certain uses of his or her work. See Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 LAW & CONTEMP. PROBS. 3, 9-10 (1981). An author may nevertheless utilize statutory rights of action under § 43 of the Lanham Act, 15 U.S.C. § 1125 (1977), common law or statutory rights arising under state laws of unfair competition, and other tort actions to defend his or her interests. The author also may protect them through contractual negotiations. See generally 2 NIMMER ON COPYRIGHT, *supra* note 11, § 8.21. A thorough discussion of "moral rights" is beyond the scope of this Article.

38. Goetsch, *supra* note 28, at 43-44.

39. *Id.* at 43.

40. *Id.* at 60-64.

41. *Id.* at 45, 63.

42. *Id.* at 64.

that parody is a form of critical speech that deserves better protection, as free speech, than the author's property right to control the publication of parody.⁴³ His argument, however, unduly simplifies the problem. While the First Amendment guarantees the *right* to speak critically, it does not guarantee unrestricted freedom as to the *manner* of critical speech to be employed, especially when that manner interferes with the legally recognized rights of others.⁴⁴ By completely removing parody from the copy-right framework, Goetsch would give the parodist absolute rights in his or her parody while the author is left with nothing, a result not justifiable by any objective appraisal of the respective interests of the parties.

A student commentator advocates a third solution, which would retire the "conjure up" test⁴⁵ and replace it with a "critical effect" test.⁴⁶ This test requires a court to decide, first, if the parody in question is a "true parody"; that is, one that criticizes, in the literary sense of criticism, the work it parodies. If the answer is affirmative, a court must then decide whether the parodist has taken more from the parodied work than is necessary to achieve the "critical effect."⁴⁷ The student writer thus focuses on the fair use factor that deals with the substantiality of the taking. She argues that since a work may be parodied by manner of performance alone, the substantiality of the taking should not be determinative if it is necessary to take that much for purposes of effective criticism.⁴⁸ Under her approach, as long as the taking is necessary to achieve the critical effect, the use will be considered a fair one, and the parodist has the burden of proving that the amount taken is necessary for the critical effect.⁴⁹

In allowing the parodist to create the best parody he or she can through a taking of as much as is necessary to accomplish an effective criticism of the original work, the student commentator has developed a copyright model based upon the literary concept of parody.⁵⁰ However, in emphasizing the critical aspect of parody, she has failed to recognize that parody serves two socially valuable functions that are intertwined: entertainment and criticism.⁵¹ She does not consider that a "humorous"

43. *Id.* at 62.

44. "The first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

45. The "conjure up" test allows a taking by the parodist of only so much as is necessary to conjure up the original work. *See supra* note 19.

46. Comment, *Parody and Fair Use*, *supra* note 28, at 165.

47. *Id.* at 189.

48. *Id.* at 187-88; *see* 17 U.S.C. § 107(3) (1976).

49. Comment, *Parody and Fair Use*, *supra* note 28, at 188, 190.

50. Parody enjoys a long history as a form of literary criticism. For an excellent, though technical, discussion of the development and function of literary parody, *see* M. ROSE, *PARODY/META-FICTION* pt. 1 (1979).

51. The debate over the true value of parody to society is a longstanding one. Literary critics have recognized parody's function as both entertainment and humor. For example, one critic has stated:

Parody is both a form of literary humor and a branch of criticism. As humor, it is probably wiser not to explain it or attempt to rationalize it. As criticism, however, one may venture a few generalizations. For one thing, it addresses itself not to original qualities of a work of art, but ridicules the pretentious or eccentric and helps separate the wheat from the chaff.

THE ANTIC MUSE: AMERICAN WRITERS IN PARODY 8 (R. Falk ed. 1955) [hereinafter cited as THE ANTIC MUSE].

The courts, on the other hand, while generally agreeing that parody is a valuable art worthy of protection, have differed as to exactly what it is that makes parody valuable. *Compare* *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 361 (1979) (in which the court indicated that a parody must have social value beyond its entertainment function in order to be protected) *with* *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (in which the court explicitly recognized parody's value as both entertainment

parody may be nothing more than an attempt at criticism that fails to convey its purpose, or that the critical effect of parody is actually in the eyes of the beholder.⁵² A distinction of this nature, which bases protection on the *quality* of the parody, goes against the very foundation of copyright law.⁵³ Furthermore, while this solution is more attentive to the original author in that it allows free use of his or her work under more limited circumstances, the parodist again receives all economic benefits once the parody is found legally permissible, and the original author receives nothing for the use of his or her work.

These commentators would solve the parody problem by treating the interests of the parodist and the original author as irreconcilable under copyright law. The commentators' solutions evidence a belief that because society has a strong interest in the creation of parody, the law should protect society's interest by abrogating, under qualified circumstances, the author's right to control and derive financial gain from parodies based upon his or her original work. The weakness of this approach is that it leaves no room for compromise; it forces an "all or nothing" solution upon conflicts over the rights to works of parody. This "all or nothing" approach is arguably responsible for the inconclusive case law of parody. If the courts recognized that they could distribute some of the benefits from parodies to both authors and parodists in a manner that would encourage the creation of parody, they might be less apt to enter judgments influenced by subjective opinions about the quality and social desirability of a particular parody. Indeed, the courts might find fair use more often and on more defensible grounds than in the past. An approach that balances the interests of original author and parodist could do much to resolve the conflicts that make the legal status of parody so difficult to work with today.

III. A PROPOSAL FOR COMPROMISE

The law of copyright can accommodate the interests of both original author and parodist in a manner that furthers society's interest in parody as a valuable tool for criticism and humor. A first step in this direction is to clarify the meaning of parody with a view to arriving at a more workable definition. This definition then may be used in conjunction with a fair use analysis that must in turn be refined and specifically tailored to meet the needs of cases dealing with parody.

and as a form of social and literary criticism) and *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980) ("in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody. . .").

One recent legal commentator on parody agreed with *Elsmere* in arguing that when deciding to protect a parody under copyright, no distinction should be made on the basis of whether its function is more critical or humorous. Light, *supra* note 28, at 634.

52. M. ROSE, *supra* note 50, § 1.5; see also *THE ANTIC MUSE*, *supra* note 51, at 15: "But the final judgment of parody must be a subjective one. It is for the reader to decide whether [the parody] meets the main requirement—to brighten up the subject, illuminate the original, and provide a happy gleam of recognition or flash of acknowledgement."

53. The test of protection of a work under copyright law is independent creation, not quality or value of the work, the latter being, by nature, a totally subjective determination. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

A. Determining the Meaning of Parody

The major copyright cases treating the issue of parody⁵⁴ have failed to develop a satisfactory definition of parody, and normally ignore definitional problems altogether.⁵⁵ These problems are not unique to the legal system. Despite the venerable history of parody as a form of literary expression, the task of defining it has proved to be difficult even for scholars. A technical definition favored by one twentieth-century literary critic, if applied by the courts, most certainly would confuse the parody analysis. That critic describes parody as a particular species of burlesque, which in turn is seen as a particular style of satire. Burlesque falls into two categories, high and low burlesque, and each category includes two forms, one which addresses itself to works in general and one which addresses itself to a particular work or style. A parody is the form of high burlesque in which a particular literary work or style is elevated by applying a "grand manner" to its "trifling themes." Travesty, the counterpart of parody, is a form of low burlesque that deflates the "elevated subject" of a particular work or style by treating it in a "trivial manner."⁵⁶ While this definition is helpful in pinning down differences in style, it reinforces the need for judicial caution in relying upon technical concepts of parody. The resulting distinctions in literary form are too mechanistic to advance the legal analysis of parody very far.

Another scholar recently defined literary parody as "the critical refunctioning of preformed literary material with comic effect."⁵⁷ She further described such parody as making the object of its attack part of its structure; the parody, therefore, depends in part on "the reader's conditioned reaction to this object of attack for the response itself."⁵⁸ By eliminating artificial and perhaps semantic distinctions, this definition comes closer to the implied case law concept of parody as a comprehensive creative form. However, it is too sweeping to illuminate the copyright analysis beyond a certain point.

Other literary definitions, though helpful in a general way, take no account of the unique legal doctrines at odds in the parody cases,⁵⁹ and courts may only have confused the issues when they have attempted to utilize literary definitions in their analyses. The literary history of parody is relevant, because it illustrates that parody always has been controversial and susceptible to individual, subjective judgments of

54. See *supra* note 15.

55. An exception is *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979), in which the court defined parody as "a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule." It added a caveat, however, that if the parody is to be eligible for fair use protection, it must make a "critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function." *Id.*

56. D. WORCESTER, *THE ART OF SATIRE* 47-48 (1940).

57. M. ROSE, *supra* note 50, §1.7.

58. *Id.*

59. See, e.g., G. KITCHEN, *SURVEY OF BURLESQUES AND PARODY IN ENGLISH* xxii (1931) ("[P]arody should be retained as a rule for direct imitations of an individual work with humorous or critical intention."); *THE ANTIC MUSE*, *supra* note 51, at 16 (A parody is a "deflationary piece of matter and impertinency in prose or verse, of brief duration which satirizes a literary style, personality or mannerism and provides the reader with a quiet explosion of mirth."); *SATIRE: A CRITICAL ANTHOLOGY* xxix (1967) ("In a parody a particular literary work or style is imitated and given a low subject — with the result that the work or style itself is ridiculed along with the subject.").

its quality.⁶⁰ However, copyright analysis requires a more objective legal definition that avoids value judgments and that recognizes that parody may serve more than just a critical or literary function.

The common understanding of parody as "a writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated,"⁶¹ though objective, takes no account of the principles that underlie current copyright terminology. A more functional definition of parody would preserve the historical concept of parody as a literary form while making room for the new media of creative expression that have developed and will continue to develop in the modern era. Such a definition should eliminate the possibility that a verbatim performance in an incongruous setting could, without more, qualify as parody for legal purposes.⁶² It also should seek to encompass the many different contexts in which parody has arisen in the case law. The definition should be sufficiently flexible to allow for the varying forms of copyrightable subject matter, and should diminish conflicts between technical literary concepts of parody and the general concepts of parody that often figure in the cases.

The issues raised in the cases themselves, when read in light of the literary analysis of parody, suggest the following definition:

A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable.

The terms used in this definition correspond to concepts that are central to copyright law and to the history of parody. "Transforms" is used to suggest the manner in which a derivative work may be created, as expressed in the section 101 definition of "derivative work."⁶³ "A significant part of an original work of authorship" is meant to encompass situations, such as the one arising in *Elsmere Music, Inc. v. National Broadcasting Co.*,⁶⁴ in which a small but crucial part of a work may be all that is needed to identify it for purposes of parody. The criterion of significance is meant to be qualitative, not quantitative, which corresponds to an accepted interpretation of "substantiality" in copyright law.⁶⁵ However, since "substantiality"

60. M. ROSE, *supra* note 50, §§ 1.1, 1.5.

61. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (1966).

62. Thus a defendant in a case like *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975), which dealt with the playing of the entire Mickey Mouse March without alteration in a film depicting sexual acts, could not qualify his or her "work" as legal parody.

63. Section 101 of the 1976 Act reads in pertinent part as follows:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101 (1976).

64. 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980). The district court held in this case that the defendant's use in a television skit of a phrase of the plaintiff's song containing four words, with nearly identical lyrics, was a "taking of a substantial nature." *Id.* at 744.

65. The meaning to be given "substantiality" and "substantial similarity" in copyright law has been a controversial issue. Courts have argued for both qualitative and quantitative interpretations. However, ample support exists for the

also has been viewed as a quantitative test, the term "significant" is preferred in order to avoid any confusion in interpretation.

"Derivative work" should be understood to have the meaning accorded it under section 101, which thus links parody to the scheme of protection given such works under the 1976 Act.⁶⁶ "Distorting," which could be read to mean "subtly distorting," is chosen because a parody, as traditionally understood, does not make great changes in the work it parodies; parody demands that the original work be recognizable.⁶⁷ "Closely imitating" is meant to dispel the idea that verbatim copying is parody permissible for copyright purposes, but it should be understood that virtually any taking short of verbatim copying can be parody for legal purposes.⁶⁸

In specifying that the enumerated uses of the original work should be "for comic effect," the intent is not that the parody be judged by the extent to which it successfully accomplishes this effect. Rather, this phrase requires that "comic effect" be part of the parodist's intended purpose in creating the parody. Parody's comic effect is the means to achieving parody's critical function,⁶⁹ and for this reason the concept of criticism does not need to be included expressly in the proposed definition.

"Independent effort of the parodist" requires that the parodist show that he or she has made an individual contribution to the creation of the parody. The quantum of creative effort required to satisfy this standard is to be determined by traditional copyright concepts of independent creation in derivative works.⁷⁰ Finally, in requiring that both the original, underlying work and the independent effort of the parodist be "recognizable," the definition does not imply that they must be separately identifiable. This standard would be satisfied if the ordinary observer,⁷¹ comparing the original work or portion of it with the parody, could distinguish one from the other.

The definition proposed above is meant to apply regardless of whether the parody focuses mainly on the work parodied or uses the work parodied to focus

interpretation of "substantiality" as a qualitative test, and this Article accepts that test as controlling. See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). For a useful discussion of this issue, see 3 NIMMER ON COPYRIGHT, *supra* note 11, §§ 13.03[A][2], 13.05[A][3].

66. See *supra* note 63. The author of a derivative work receives copyright protection of the portion of the work that he or she created, as long as his or her use of the preexisting material in the derivative work was lawful. 17 U.S.C. § 103 (1976).

67. M. ROSE, *supra* note 50, § 1.5.

68. By qualifying the literary view of parody as "imitating," see *id.* § 1.2, with the word "closely," this element supports the concept implied in *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd per curiam sub nom. Columbia Broadcasting Sys., Inc. v. Loew's, Inc.*, 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958), that a verbatim copying exceeds the scope of fair use. The proposed definition requires that verbatim copying not be permitted unless it is de minimis; the definition differs from *Benny*, however, in allowing a substantial or nearly verbatim copying to qualify as protected parody if all other criteria are met. Thus a parodist is less limited in his or her ability to create the "best parody" than under prior doctrines. For an example of prior doctrines, see *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (denying defendant the right to make the "best parody" in an attempt to balance the interests of original author and parodist).

69. M. ROSE, *supra* note 50, § 1.3.

70. Independent creation in derivative works must generally involve more than a minimal contribution by the author of the derivative work. See *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976); 1 NIMMER ON COPYRIGHT, *supra* note 11, § 3.03.

71. The "ordinary observer" is generally understood in copyright law to mean the reasonable person or reasonable member of the audience to which the work in question is directed. 3 NIMMER ON COPYRIGHT, *supra* note 11, § 13.03[E].

attention on aspects of life in general or on social criticism.⁷² The *form* of the work is what makes it a parody here, and neither its focus nor its degree of success in accomplishing its purpose is to be considered in determining whether the work in question is a parody. The parodist is meant to have the burden of proof in establishing that his or her work fits this threshold definition of parody.

B. *Sharing the Economic Benefits of Parody*

1. *Limits of Section 107 Fair Use as Currently Applied*

While a functional definition, such as the one proposed in this Article, would enable a court to identify the elements of parody more clearly and to base its remaining decisions upon objective factors, such a definition must be used in conjunction with a more refined analysis of fair use than is customary at the present time. Despite the difficulties engendered by the fair use doctrine, fair use offers the greatest opportunities for developing an approach to parody that can balance the interests of all of the parties concerned within the philosophical framework underlying the copyright system.⁷³

However, fair use must be tailored to fit the specific needs of parody. The four fair use factors codified in section 107⁷⁴ are not enough to resolve the unique problems of parody. Under the first factor, "the purpose and character of the use,"⁷⁵ parody can claim a presumption of social value, since it seeks to criticize or entertain or to do both. Yet virtually all of the parodies that have been the subject of litigation to date have been of a commercial nature. As commercial works, their claim to the fair use privilege is weaker than it would be if they were works of a nonprofit or educational nature. Probably most disputed cases will continue to involve a use of a commercial nature, which weighs against the parodist's ability to prove fair use.

The function of the second factor, the "nature of the copyrighted work,"⁷⁶ is

72. Several of the courts treating parody have been concerned with the question of whether a parody must specifically parody the work from which it is derived or need only use that work to parody aspects of life or society. For example, *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979), held that if a parody is to warrant protection under fair use, "it should parody that part of the original work which it copies." *Id.* at 360. If it closely parallels an entire work, "it should parody at least a majority of those parts or elements of the original work which it parallels." *Id.* *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975) denied fair use to a defendant who played an unaltered version of the Mickey Mouse March in an incongruous setting allegedly to parody the mores of society. *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), resolved the debate by holding: "[A] permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general. However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up."

The better view, and the one adopted in this Article, is that a parodist should not be required to parody the original work utilized in the parody in order to claim fair use under copyright law. See *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) ("the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself").

73. This approach, therefore, must serve the economic rationale underlying copyright by protecting the financial incentives given to all artists in order to inspire creativity, *Mazer v. Stein*, 347 U.S. 201, 219 (1954), and need not concern itself with the protection of personal, or moral, rights.

74. See *supra* note 13.

75. 17 U.S.C. § 107(1) (1976).

76. *Id.* § 107(2).

unclear. It has been interpreted as permitting a finding of fair use more readily in cases dealing with informational works than in those dealing with works of a creative or entertaining nature.⁷⁷ If this interpretation is accepted, it will weigh against the parodist, because parodies are usually derived from creative, not informational, works. The nature of the original work also is pertinent to how the parody is to be accomplished. For example, if the original work is a poster, a parody of it will be accomplished in a different manner from a parody of a song, because of the difference in media employed. Whether the original work is itself of a commercial or a nonprofit, educational nature is not an express consideration under this factor, and in any case, should not determine the treatment of the parody as such. The first two factors found in section 107 thus provide some guidelines for the treatment of parody, but these factors do not clearly tip the scales for either party.

The third factor, "the amount and substantiality of the portion used,"⁷⁸ weighs in favor of the original author. In using as much of the original work as is necessary to evoke its image, the parodist's use always will be substantial. However, the fourth factor, "the effect of the use upon the potential market" for the original work,⁷⁹ favors the parodist, because a parody almost never would serve as a substitute for the original work.⁸⁰ A parody may satisfy curiosity about the original work so that sales of the original work decrease and financial gain thereby is lessened. Parody may instead increase demand for the original, and in this way increase financial gain. However, parody almost never will serve as a direct market substitute. The end result is that, if weighted equally, the third and fourth factors of the fair use analysis tend to cancel each other out. A court trying to apply section 107 to parody thus may be left with no operative basis of decision unless it gives disproportionate weight to one of the four factors.

While none of the four factors, as currently interpreted, should be decisive in cases of parody without more, section 107 leaves room for the application of additional factors in making a determination of fair use.⁸¹ The adoption of two new fair use criteria, good faith and reasonable royalties, therefore is recommended for use specifically in cases dealing with parody in order to aid the courts in balancing the interests of the original author and the parodist.

77. 3 NIMMER ON COPYRIGHT, *supra* note 11, § 13.05[A][2]. See specifically *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981), *rev'd on other grounds*, 104 S. Ct. 774, *reh'g denied*, 104 S. Ct. 1619 (1984). The majority opinion of the Supreme Court does not discuss the second fair use factor; however, the dissenting opinion is in accord with the Ninth Circuit's interpretation of the application of this fair use factor. *Id.* at 625-26.

78. 17 U.S.C. § 107(3) (1976).

79. *Id.* § 107(4).

80. Because parody, through distortion or close imitation of a work, attempts to achieve a comic and thus critical effect, it serves a different purpose from that of the original work itself. Parody rarely comes so close to the original work that it serves the same function, in the audience's perception, as the original work. *But cf. Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 362 (N.D. Ga. 1979) (holding that the defendant's musical entitled "Scarlett Fever," though not a parody under the court's definition, was likely to harm the potential market for the plaintiff's derivative use of its movie "Gone With The Wind" as a theatrical adaptation).

81. In determining fair use, § 107 states that the factors to be considered *shall include* the four factors set forth in its text. Under § 101 of the 1976 Act, the term "including" is "illustrative and not limitative." Therefore, a court has the discretion to consider additional factors not set forth in § 107 if it deems them relevant to a consideration of fair use.

2. *Augmenting Section 107 with Additional Factors*

a. *Good Faith*

In parody cases, the concept of fair use should not be applied without subjecting the parodist to a test of good faith. A "good faith" requirement in this context is comprised of two elements. As a threshold step, the court should require the parodist to show that he or she actually *intended* to create a parody at some point during the elaboration of the new work. If the definition of parody proposed in this Article is met, the parodist would have established a presumption that he or she intended to create a parody.⁸² However, the original author should have the opportunity to rebut this presumption. Such an opportunity would cover the situation that arose in *MCA, Inc. v. Wilson*,⁸³ in which a work very similar to that of another author was belatedly labelled a parody after completion in an attempt to excuse it from copyright infringement.⁸⁴

A second element of good faith should require the parodist to show that he or she made a reasonable attempt to obtain consent to parody from the original author or the relevant copyright owner. Under section 106 of the 1976 Act, consent to use another's work is normally mandatory unless excused by fair use under section 107.⁸⁵ In the case of parody, an intervening step is necessary to prevent the parodist from bypassing the author in the expectation that fair use, if available, will automatically excuse the need for consent. Rather, in parody cases, the parodist should be formally obliged to deal with the author before asking the court to provide shelter within the fair use doctrine. Such a shelter may be rendered unnecessary or even unavailable if the author of the underlying work can demonstrate a willingness to have licensed the parody on reasonable terms. The presumption that certain authors would not consent to being parodied should not obscure the probability that many others would regard the commercial rewards from this kind of derivative work with interest and would prefer to negotiate conditions that would reward them financially while protecting their personal interests.

82. The proposed definition establishes criteria that are indicative of intent to parody by requiring the parodist to prove an intention to create "comic effect" and to prove his or her "independent effort." See *supra* text accompanying notes 69-71.

83. 677 F.2d 180 (2d Cir. 1981).

84. The defendant in *MCA* testified that he did not intend his work to be a burlesque or satire (the equivalent of parody in this article) at the time that he wrote it. It was during rehearsal that he formed the intent to use his composition as a burlesque. The court obviously gave weight to this factor in making the following decision:

We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism. We conclude that defendants did not make fair use of plaintiff's song.

Id. at 185. See also *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) and *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124, 129 (N.D. Ga. 1981), in which the courts refused to consider the defendants' claims of parody under fair use when the defendants had presented no evidence to justify calling their work a parody.

85. Because the author has the exclusive right to prepare derivative works under 17 U.S.C. § 106(2) (1976), a parodist's unauthorized use is infringement under 17 U.S.C. § 501(a) (1976) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright."), unless fair use is found under 17 U.S.C. § 107 (1976) ("the fair use of a copyrighted work . . . is not an infringement of copyright").

If the parodist does request consent and the original author agrees to give it only if he or she receives payment for the use, the court should consider whether the terms of the agreement proposed by the original author were reasonable under the circumstances. If the parodist refused to enter into an agreement deemed reasonable by the court, this action may be construed as an unreasonable attempt to obtain consent. If, instead, the original author refused consent despite efforts to obtain it, a court should consider the reasonableness of this refusal principally from a commercial perspective. Declining an otherwise commercially valid proposal looks like an attempt to prevent parody. If consent to parody is withheld for reasons that look suspiciously like an attempt to protect "moral rights," United States courts need not be unduly sympathetic to the original author in the absence of statutory protection of such rights.

If the parodist is unable to obtain consent to parody, whether resulting from the original author's choosing to stand upon his or her exclusive rights under section 106 despite the parodist's commercially reasonable offer or for some other reason beyond the parodist's control, then the parodist should not be denied the legal right to parody. However, he or she must give something to the author in exchange for this right, which leads to the concept of reasonable compensation.

b. *Reasonable Royalties*

The second criterion proposed for the administration of the fair use doctrine in parody cases would require the showing of payment, or an offer of payment,⁸⁶ by the parodist to the original author, of a reasonable royalty based upon a percentage of the net profit that the parodist derives from exploitation of his or her parody.⁸⁷ A court in

86. In some instances, if a parodist's good faith offer to pay royalties was refused by the author, a court may consider that offer as enough to satisfy the second criterion proposed here. However, it is preferable that the parodist escrow royalties on the author's behalf if the parodist is unable to make direct payment to the author. *See infra* note 89.

87. The concept of payment for fair use is not new in copyright law. Timberg has proposed requiring the user of the original work of authorship to compensate the original author for his or her "fair use" if the use is economically profitable, if the use does economic harm to the copyright owner, and if the user is able to pay compensation. Timberg, *A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age*, 75 NW. U.L. REV. 193, 236 (1980); *see also* Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 30 J. COPYRIGHT SOC'Y 253, 281-83 (1983) (discussing reasonable royalties as an alternative to fair use and as a cure for market failure); Bernstein, *supra* note 28, at 43 (considering a type of compulsory licensing scheme which would compensate a copyright owner for economic harm suffered at the hands of a "secondary user"). Furthermore, at least one court has considered the defendant's offer to pay a reasonable royalty, in the form of all profits, to the plaintiff for use of his or her work in arriving at a finding of fair use. *See Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

In addition, two current laws governing intellectual property provide for the payment of reasonable royalties, under certain circumstances, for an unauthorized or infringing use. Section 907 of the Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3347, 3351-52 (to be codified at 17 U.S.C. § 907), provides for payment of a reasonable royalty by "innocent purchasers" of a protected work as an alternative to court-awarded damages. Though the Semiconductor Chip Protection Act of 1984 creates a *sui generis* form of intellectual property right, similar versions of protective legislation for semiconductor chips were proposed as amendments to the 1976 Act, and the final version as signed into law is based in many respects upon copyright principles of protection. H.R. REP. NO. 781, 98th Cong., 2d Sess. 5-11, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 5750, 5754-60. The reasonable royalty alternative created by § 907 requires that an innocent purchaser (one who acted in good faith without notice that the semiconductor chip product purchased was protected by the owner's exclusive right to reproduce or distribute the mask work embodied in the semiconductor chip product) pay a reasonable royalty, the amount of which is to be determined by voluntary negotiation, to the owner of the mask work or be subject to court-awarded damages for infringement. 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3347, 3351-52. Compare § 511 of an earlier version,

such a case may allow the parodist to show payment in one of two ways. The parodist could simply send periodic payments to the original author, after verifying that the latter is indeed the copyright owner. If the original author accepts them, he or she should not be deemed to have waived any right to a cause of action that he or she would otherwise have under the copyright statutes or other laws that protect an original author's moral rights or economic interests.⁸⁸ If the original author later brings suit against the parodist for copyright infringement and prevails, the parodist should be entitled to either a set-off for any nominal, actual or statutory damages awarded, plus costs and attorney fees, or recoupment, where an injunction is granted or where there is overpayment. Should the parodist be unable to send payment directly to the original author, through no fault of his or her own,⁸⁹ the escrow of the payments pending resolution of any technical problems or disputes should satisfy the requirement of payment.

In determining how reasonable is reasonable,⁹⁰ a parodist may first look to industry standards. If he or she can find direct evidence of what normally would be acceptable in negotiating licenses between parodists and original authors, taking into account the type of use to be made of the parody,⁹¹ and if the parodist then bases the royalty upon these standards, it should be deemed reasonable by the court. However, this sort of evidence is not likely to be abundant until and unless courts insist on direct negotiations as a pre-condition to a claim of fair use, as this Article proposes. When industry standards do not exist or are indeterminable, a good faith belief that the rate actually chosen was reasonable under the circumstances should be enough to satisfy this standard, if not rebutted by other evidence.

proposed by the U.S. Senate, of legislation protecting semiconductor chips for a slightly different treatment of the payment of reasonable royalties by innocent purchasers. S. REP. NO. 425, 98th Cong., 2d Sess. 35-36 (1984). Another law, 28 U.S.C. § 1498 (1982), requires the U.S. government to pay "reasonable and entire compensation" to the owner of a patent or copyright as damages for infringing upon the patent or copyright. This statutory remedy is "generally equated to a 'reasonable royalty.'" S. REP. NO. 425, 98th Cong., 2d Sess. 25 (1984) (citing *Decca Ltd. v. United States*, 640 F.2d 1156 (Ct. Cl. 1980) and *Leesona Corp. v. United States*, 599 F.2d 958 (Ct. Cl.), *cert. denied*, 444 U.S. 991 (1979)).

88. The Lanham Act, 15 U.S.C. §§ 1051-1127 (1977), for example, protects against trademark infringement and unfair competition, and it is not preempted by the 1976 Act. See 17 U.S.C. § 301(d) (1976). States may have also enacted or developed through their judicial systems laws protecting rights to privacy and resale of certain types of artistic works and laws against unfair competition.

89. The parodist may be "unable" to make payment to the author for any one of several reasons. The author may refuse any payments sent to him or her by the parodist in the belief that he or she is preserving all rights to sue for infringement by doing so or for other reasons. The parodist may be unable to determine with certainty the identity or location of the copyright owner. The parodist might also, in good faith, believe that sending payments directly to the original author or copyright owner is unwise, as in the case where litigation over the parody is threatened or has already been instigated.

90. "How reasonable" refers to determining what percentage of net profit is reasonable under the circumstances. This provision is similar to the customary standard for "reasonable royalties" considered by the Senate in connection with proposed legislation protecting semiconductor chips:

The question of what constitutes a "reasonable" royalty for the chip is a matter, in part, of the equities of the user; and in part, a more objective question—usually posed as what a "willing purchaser" would pay a "willing seller" if they negotiated a license in good faith.

S. REP. NO. 425, 98th Cong., 2d Sess. 25 (1984) (citing *Horvath v. McCord Radiator & Mfg. Co.*, 100 F.2d 326 (6th Cir. 1938) (construing 35 U.S.C. § 284 (1984), which grants damages for infringement to a patentee of no less than a reasonable royalty)).

91. "Type of use" affects the reasonableness of the royalty rate to be charged. If a parody takes the form of a movie to be distributed nationally as a popular release, the returns from it will certainly be potentially greater than those from a parody of a more intellectual work of fiction that addresses a narrow audience. Thus the parodist may properly consider the nature of his parody when determining a reasonable royalty.

The royalty percentage should be based upon net, instead of gross, profit so that the parodist and original author share in the actual profits, exclusive of expenses. As set forth in section 504(b) of the 1976 Act,⁹² in any disputed action the original author should be asked to present proof only of the parodist's gross revenues from the parody and the parodist should be required to prove his or her deductible expenses. If a court finds that the royalty rate was chosen in good faith but is unreasonable, it may make a finding of fair use conditional upon the payment of a different rate. The court also may require continued payment of the royalty as a condition to the prolonged use of the original work without consent, in order to protect the original author's rights should the parodist attempt to terminate payment after a finding of fair use is made. Finally, if the parody makes no profit, then no royalty payment can be or need be made to the original author.⁹³

IV. COMPETING INTERESTS IN BALANCE

Recourse to reasonable royalties in parody cases would foster recognition of the principle that when a legal right is taken from the original author and no overwhelming public interest in taking it is shown, he or she should be compensated for the use if the user profits from it.⁹⁴ Although parody has a long and venerable history, its value to society is not such as to justify an absolute taking of the original author's property right in his or her creative work. Reasonable royalties permit a compromise to be made. If a court is satisfied that a parodist has in good faith created a parody, it may invoke the fair use doctrine to limit the original author's right to control this particular use of his or her work. However, by requiring reasonable royalties, the same court ensures that the author will share in the economic benefits from parody, if the parody is profitable. Such benefits are ones that the author very likely would not otherwise have obtained, in view of the unclear status of the author's rights concerning works of parody under current law. In making the payment of reasonable royalties a prerequisite to the finding of fair use, the original author could receive payment without obliging a court to reach a decision on the infringement issue, which otherwise might render the parodist's use unlawful and deny the parodist copyright protection of his or her own work,⁹⁵ therefore undermining the parodist's incentive to create parody.

92. Section 504(b) reads in pertinent part: "In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b) (1976).

93. Some practical concerns in implementing the criterion of payment of reasonable royalties should be noted. A notice problem exists because this solution is a judicial, as opposed to a statutory, one. A parodist therefore has no idea that he or she must pay, offer to pay, or escrow royalties in order to prevail under this proposed fair use analysis until a case on point is decided. In establishing a new practice, courts should be flexible in providing for the payment of reasonable royalties after the fact as a condition to a finding of fair use, once the proposed definition of parody and the tests of good faith are met.

94. It should be emphasized that the payment of reasonable royalties is not proposed as a type of provision for damages. Payment does not depend upon whether the author suffers economic harm through the use of his or her work by a parodist. Reasonable royalties simply recognize the author's potentially valuable property right in his or her original work in an attempt to give both author and parodist economic reward from their creations.

95. 17 U.S.C. § 103 (1976).

The reasonable royalty approach has a further advantage in that it indirectly resolves the question of the value to society of the particular parody in question. If a parodist creates a serious literary or critical parody from an original work, the commercial rewards normally will not be large and the parodist will receive little financial gain from it, if any at all. In this event, the original author is discouraged from suing for infringement because, if the derivative work meets the test for legal parody suggested in this Article, all that the original author could recover would be reasonable royalties. Such royalties probably would not even cover the cost of the suit. Parodies for select audiences based on serious intellectual endeavors thus remain protected and encouraged. If a parody provides no financial gain to the parodist, the parodist need not fear a claim for payment by the original author. In contrast, when a more commercial parody is created, especially when it is based upon works that have become popular successes, mandating payment of reasonable royalties ensures that the original author receives financial benefit from the use of his or her work.

Adopting this approach has several other advantages. It encourages the parties to negotiate licenses directly. If the parodist and the original author know that the courts favor a balancing of their interests in this manner, they may be persuaded to compromise on their own and thus resolve their differences around the negotiating table instead of in the courtroom. In this spirit, moreover, the original author and parodist may come to mutually acceptable determinations regarding the preservation of the original author's moral rights, which otherwise are not recognized in the 1976 Act. The concept of requiring payment based upon net profit in parody cases also helps to resolve the First Amendment implications in this area.⁹⁶ The requirement of good faith and the threat of reasonable royalties, in the absence of negotiated royalties, do not prevent the parodist from parodying. However, they do require the parodist to share any profit that he or she makes when the parody is found to constitute a fair use in derogation of the original author's exclusive rights.

The conflict that parody creates in determining whose interest, author's or parodist's, should be protected under copyright law thus does not have to be resolved completely in favor of one party or the other. Society has an interest in protecting both the parodist and the original author, each of whom can make valuable contributions to the progress of the arts. The copyright system can protect the interests of both parties by incorporating the concepts of good faith and reasonable royalties into the fair use analysis. This approach benefits society because parody is encouraged, regardless of whether it is more critical or more entertaining in its effect, and because the parodist and original author are encouraged to negotiate and resolve their differences privately, instead of through the court system. Although this approach does not solve all of the difficulties that parody creates for copyright law, it does balance

96. The required payment is implicitly based on ability to pay, because the parodist must compensate the author only if the parodist derives a net profit from his or her use. Nevertheless, the parodist has the freedom to parody without fear of liability for infringement, as long as he or she meets the other proposed criteria. For a view that requiring compensation for fair use does not necessarily compromise First Amendment rights of free speech, as long as the remuneration is compensatory as opposed to penal, see Comment, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320 (1979).

the interests of those who have the greatest effect on the creation of parody, the original author and the parodist. Only by balancing these competing interests will the kind of compromise be struck that will encourage the vitality of parody under United States copyright law.

